LEGISLATURE PROVIDES FOR "P.O.D." CERTIFICATES OF DEPOSIT

In the Matter of Estate of Atkinson
175 N.E.2d 548 (Ohio P. Ct. 1961)

Testator left three sums of money on deposit in a savings bank in an attempt to exclude his wife from her statutory share of his estate. For the deposits he took three certificates of deposit. The certificates recited the deceased depositor's name followed by "P.O.D.," an abbreviated form of "payable on death," and the names of the decedent's daughters by a former marriage.[1] The widow elected to take against the will. She filed exceptions to the inventory and appraisement of the estate contending that the bank deposits should have been included. The daughters argued that the certificates of deposit passed to them upon the depositor's death by virtue of the "payable on death" language. They insisted that there is no difference between "P.O.D." certificates and joint and survivorship bank accounts in the names of A or B or the survivor of them.[2] The court sustained the widow's objections and held that testator's certificates were an invalid attempt at a testamentary distribution.[3]

The joint and survivorship bank account is well established in Ohio. However, these contracts have been found valid only when there existed a presently vested interest in both co-depositors.[4] The court in the instant case was unable to find a present interest in the daughters, because they had no right to the money until testator's death. It found support for this position in decisions from other jurisdictions which have dealt with certificates of deposit.[5]

As an alternative to the joint and survivorship bank account analogy, counsel for the daughters might have advanced a different theory in support of their contention. It could be argued that by use of the certificate phraseology and in light of surrounding circumstances, testator intended to

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[1] In the Matter of Estate of Atkinson, 175 N.E.2d 548 (Ohio P. Ct. 1961). The purpose of excluding the wife was clearly expressed in the will.

[2] See Alexander, "Joint and Survivorship Property," 20 Ohio St. L.J. 75 (1959).

[3] In the Matter of Estate of Atkinson, *supra* note 1, at 550. The court commented:

> "It is clear in the present matter that there was no present interest of any kind created in the decedent's daughters by the language used in the certificate of deposit. On the contrary, the words 'payable on death' are clearly testamentary."

The court concluded that this was contrary to the Statute of Wills, Ohio Rev. Code § 2107.03 (1961).

[4] Ohio Rev. Code § 1105.09 (1953). Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935); *In re* Estate of Hutchison, 120 Ohio St. 542, 166 N.E. 687 (1929); Cleveland Trust Co. v. Scobie, Adm'r, 114 Ohio St. 241, 151 N.E. 373 (1926); Schmitt v. Schmitt, 39 Ohio App. 219, 177 N.E. 478 (1928); Waltbillig v. Burke, 17 Ohio App. 444 (1923); *In re* Estate of Krakoff, 87 Ohio L. Abs. 387, 179 N.E.2d 566 (C.P. 1961).

[5] Vercher v. Roy, 171 La. 524, 131 So. 648 (1930); McGillivray v. First Nat. Bank, 56 N.D. 152, 217 N.W. 150 (1927).

create a "Totten" or tentative trust. This trust device has been recognized by the Restatement of Trusts[6] and has been adopted in twelve jurisdictions.[7] The "Totten" trust, first established in New York,[8] is created by the deposit of money in the depositor's own name as trustee for another. It is a tentative trust revocable at any time during its existence. The beneficiary has no control over the deposit until the death of the depositor. If the depositor dies before the beneficiary, without having revoked the trust, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.[9]

The position of the "Totten" trust in Ohio law at the time of Atkinson's deposits was highly uncertain. In one case there is indication that although the court did not recognize the Totten trust by that name, it may have done so in substance.[10] The Ohio legislature in the 1961 session placed its sanction upon this type of trust with respect to deposits in a building and loan association, having done so earlier for deposits in a bank.[11]

It seems that counsel's biggest task in the *Atkinson* case would be that of showing the requisite intent on the part of the depositor to create a trust. The standard phraseology "as trustee for" or "in trust for" is not present. Yet even in the absence of these words, the court may find from surrounding circumstances an intent to create a trust.[12] One court construing the term "P.O.D.," found no presumption of intention to create a trust was raised by the term "P.O.D." alone.[13]

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[6] Restatement (Second), Trusts § 58 (1959).

[7] Peppercorn, "Totten Trusts in Kansas," 9 Kan. L. Rev. 51 (1960).

[8] Matter of Totten, 179 N.Y. 112, 124, 71 N.E. 748, 752 (1904).

[9] *Id.* See also Restatement (Second), Trusts § 58 (1959); 7 Am. Jur. *Banks* § 438 (1947).

[10] Jones v. Luplow, 13 Ohio App. 428 (1920). The settlor deposited money in a savings account with herself as trustee for another. The court held that even though the depositor retained the pass book and made withdrawals from the account, the trust was valid and upon her death the beneficiary took. There is, however, some question as to whether the court recognized the settlor's right to revoke the trust, a necessary ingredient for a tentative trust. The opinion refers to the withdrawal of funds as not being a revocation because the settlor had reserved no such right. Nevertheless, the trust device in this case manifests several characteristics of the "Totten" trust.

[11] Ohio Rev. Code § 1151.191 (1961). See also Ohio Rev. Code § 1105.10 (1953) which authorizes deposits of money in a bank in trust for someone else.

[12] Bierau v. Bohemian Bldg. Loan & Savings Assoc., 205 Md. 456, 109 A.2d 120 (1954); Bogert, Trusts 47 (1952); Scott, Abridgement of the Law of Trusts § 58.1 (1960).

[13] Note Ohio Rev. Code § 1105.10 (1953), which authorizes the trust deposit for banks. See also Bank of Perryville v. Kutz, 276 S.W.2d 593 (Mo. App. 1955). In this Missouri case a depositor had placed upon his record of deposits "Payable on death to Tony Kohlfeld." This was held not to create a trust because no extrinsic facts showed depositor's intent to create an interest in the beneficiary nor that he considered himself or the bank as trustee to hold title for the beneficiary. The fact that the court was particularly concerned with finding extrinsic facts to support a trust intention indicates that "P.O.D." in and of itself is not a sufficient demonstration of the requisite intent.

The Ohio General Assembly in the 1961 session has provided an opportunity for depositors to do exactly what the probate court denied Atkinson the right to do.[14] Notwithstanding the Ohio Statute of Wills,[15] depositors may enter into written contracts with savings institutions authorizing deposits payable on death. The statute specifically sanctions use of "P.O.D." as an abbreviation for "payable on death." The interest of the beneficiary will not vest until the death of the depositor. The legislature has established the contract principle that defense counsel argued for in the *Atkinson* case. This new section differs from the one cited above establishing limited use of the "Totten" trust in that it mentions only use of a written contract which avoids the adoption of a trust theory.[16] Furthermore, this contract right extends to all authorized depository institutions whereas the new "Totten" trust section is narrow in scope, dealing only with building and loan associations.[17]

As a result of these new Ohio Revised Code sections, there exists considerably more testamentary flexibility in Ohio. Many people not wishing to go to the expense of having a will drafted may provide for the disposition of a substantial part of their estates by virtue of a contract with a savings institution. By embodying the essential ingredients of the "Totten" trust in the new Revised Code sections, the legislature has enabled a depositor to change allocations to beneficiaries of the bank account whereas a testator may not shuffle the distributions to legatees without being subjected to the formality and expense of redrafting a will.[18] There is, however, no apparent beneficial tax treatment to be gained through use of the new Revised Code sections.[19]

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[14] Ohio Rev. Code §§ 2130.10, 2131.11 (1961).

[15] Ohio Rev. Code § 2107.03 (1953).

[16] *Supra* note 14.

[17] *Supra* note 10.

[18] In this regard see the "pour over" statute passed by the Ohio Legislature in 1961, Ohio Rev. Code § 2107.63 (1961).

[19] Ohio Rev. Code § 5731.02 (1953).